Supreme Court, U. S.
FILED
JUL 3 1980
MICHAEL RODAK, JR., CLERK

No. 80-11

In The

Supreme Court of the United States

October Term 1980

J. Gregory Merrion and Robert L. Bayless,
d/b/a Merrion and Bayless, Jerome T. McHugh,
Chase Oil Company, Dugan Production Corporation,
Consolidated Oil and Gas, Inc.,
Southland Royalty Company, Tesoro
Petroleum Corporation, Amerada Hess Corporation,
Supron Energy Corporation, Energy Reserves Group, Inc.,
J. M. Huber Corporation, Continental Oil Company,
(now Conoco Inc.),
Atlantic Richfield Company,
Phillips Petroleum Company,
Tenneco Oil Company, Getty Oil Company,
Gulf Oil Corporation, Mobil Oil Corporation
and Oxy Petroleum, Inc.,

Petitioners,

v.

Jicarilla Apache Tribe, Jicarilla Apache
Tribal Council, and Cecil Andrus,
Secretary of the Interior,

Respondents.

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals For
The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

Jason W. Kellahin
Kellahin & Kellahin
P. O. Box 1769
Santa Fe, New Mexico 87501
Telephone: (505) 982-4285

Thomas H. Burton
John M. Wimbish
P. O. Box 2197
Houston, Texas 77001
Telephone:
(713) 965-1030

Bruce D. Black
Campbell & Black
P. O. Box 2208
Santa Fe, New Mexico 87501
Telephone: (505) 988-4421

Counsel for Petitioners

QUESTIONS PRESENTED

1. Whether the Constitution of the United States permits Indian tribes to exercise governmental powers of taxation of production of oil and gas by non-Indians without congressional approval.

2. Whether the Court of Appeals can impute attributes of inherent sovereignty to include tribal powers of taxation, without support in and contrary to the record below.

3. Whether such a tax can be justified where it is not imposed as a condition of entering onto Indian lands under leases entered into by the tribe and approved by the Secretary of the Interior.

4. If Indian tribes have the power to tax oil and gas produced under valid leases approved by the Secretary of the Interior, whether that power is pre-empted on Executive Order Indian reservations by 25 U.S.C. 398(c) and a total federal regulatory scheme.

5. If Indian tribes have governmental authority to impose taxes on non-Indians, whether constitutional provisions protect such non-Indians from abuses of tribal authority.

6. Whether taxation of production of oil and gas by both the State and Indian tribes unduly burden interstate commerce.

TABLE OF CONTENTS

	PAGE
Questions Presented	i
Table of Contents	ii
Table of Authorities	iii
Opinion Below	1
Jurisdiction	2
Constitutional Provisions, Treaties, Statutes, and Executive Orders Involved	2
Statement of Case	2
Reasons for Granting the Writ	5
This Case Presents Important Questions of Federal Law Which Have Not Been, But Should Be, Settled By This Court	5
1. Do Indian Tribes Have the Power to Tax Non-Members as a Condition for Remaining on the Reservation Under Pre-Existing Contracts?	9
2. If Indian Tribes Have Taxation Authority Over Non-Indians, Has Such Authority Been Preempted on Executive Order Reservations By 25 U.S.C. 398c?	17
3. If Indian Tribes Have Governmental Authority Over Non-Indians, Must Non-Indians Be Accorded the Full Range of Constitutional Protections Against Abuses of Tribal Authority?	21
4. Does the Tribal Tax Unduly Burden Interstate Commerce?	26
Conclusion	28

TABLE OF AUTHORITIES

Cases Cited

	PAGE
Amoco Production Company v. Peter MacDonald, No. CV-79-155-B (D.N.M.)	8
Arizona Public Service Company v. Cecil Andrus, No. CV-78-238-C (D.N.M.)	8
Blackfeet Tribe of Indians v. State of Montana, No. CV-78-61-GF (D.Mont.)	9
Central Machinery Co. v. Arizona State Tax Comm., — U.S. — U.S. L.W.— (No. 78-1604, June 27, 1980)	5
Cipriano v. City of Houma, 395 U.S. 701 (1969)	25
City of Phoenix v. Kolodziejski, 399 U.S. 204 (1970)	25
Conoco Inc. v. Shoshone and Arapahoe Tribes, No. C-80-0181 (D.Wyo.)	8, 9
De Coteau v. District County Court, 420 U.S. 425 (1975)	17
Dean Milk Co. v. Madison, 340 U.S. 349 (1951)	26
Evans v. Cornman, 398 U.S. 419 (1970)	25
Groundhog v. Keeler, 442 F.2d 674 (10th Cir. 1971)	23
Healy v. James, 408 U.S. 169 (1972)	23
Kerr-McGee Corp. v. Navajo Tribe of Indians, et al., CIV 80-247-PHX-WPC (D.Ariz.)	9, 24
Kerr-McGee Corp. v. Navajo Tribe of Indians, No. CV-79-383-M (D.N.M.)	8
Late Corporation of the Church of Jesus Christ of Latter-Day Saints v. United States, 136 U.S. 1 (1890)	11, 12
McClanahan v. Arizona State Tax Commission, 411 U.S. 164 (1973)	9, 12
Nevada v. Hall, 440 U.S. 410 (1979)	24
Oliphant v. Suquamish Indian Tribe, 435 U.S. 191 (1978)	15, 23, 24
Organized Village of Kal[illegible] v. Egan, 369 U.S. 60 (1962)	17
Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)	24
Quechan Tribe v. Rowe, 531 F.2d 408 (9th Cir. 1976	24
Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978)	16, 22

PAGE

Salt River Project Agricultural Improvement and Power District v. Navajo Tribe of Indians, 9th Cir. No. CA 78-3492 8
Sears, Roebuck & Co. v. Stiffel Co., 376 U.S. 225 (1964) 20
Southern R. Co. v. Greene, 216 U.S. 400 (1910) 23
Southland Royalty Company v. Navajo Tribe of Indians, C-79-0140 (D.Utah) 8
State of Washington v. Confederated Tribes of the Colville Indian Reservation, — U.S. —, 48 U.S. L.W. 4668 (June 10, 1980) 5, 6, 7, 8, 9, 10, 11, 13, 14, 17, 24
Terry v. Adams, 345 U.S. 461 (1953) 25
Union Oil Co of Calif. v. Peter MacDonald, et al, CIV 79-738 (D.N.M.) 9
United States v. Kagama, 118 U.S. 375 (1886) 12, 16
United States v. Sioux Nation of Indians — US — (No. 79-639, June 30, 1980) 17
United States v. Wheeler, 435 U.S. 313 (1978) 13-14
Warren Trading Post Co. v. Arizona Tax Commission, 380 U.S. 685 (1965) 20, 21
Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938) 27
White Mountain Apache Tribe v. Bracker, — U.S. —, U.S. L.W. — (No. 78-1177, June 27, 1980) 5, 12, 16, 17, 18, 21

Constitution, Treaties and Statutes

United States Constitution:

Article I, Section 1 ..... 2, 15
Article I, Section 8, Clause 3 ..... 2, 3, 26
Article II, Section 1 ..... 2, 15
Article III, Section 1 ..... 2, 15
Article IV, Sections 1, 3 and 4 ..... 2, 15
Article V 2, 15
Article VI 2, 15
Article VII 2, 15
Fifth Amendment 2
Tenth Amendment 2, 15
Fourteenth Amendment 2

Treaty of Guadalupe Hidalgo with Mexico, 1848, 9 Stat. 922 ..... 2, 3, , 11, 12

PAGE

Statutes:

25 U.S.C. § 71 (Act of March 3, 1871, c. 120, § 1, 16 Stat. 566) 18, 20

25 US.C. §281 (Act of March 3, 1871, c. 120 § 3, 16 Stat. 570) 20

25 U.S.C. § 396d (Act of May 11, 1938, c. 198, § 4, 52 Stat. 348) 20

25 U.S.C. § 398c (Act of March 3, 1927, c. 299, § 3, 44 Stat. 1347) 2, 3, 4, 5, 17, 18, 19

25 U.S.C. § 415 (Act of Aug. 9, 1955, c. 615, § 1, 60 Stat. 539 as amended) 20

25 U.S.C. § 461, *et seq*, § 476-477 (Indian Reorganization Act of June 18, 1934, c. 576, § 1, *et seq.*, 48 Stat. 984 *et seq.*, 397-88) 2, 3, 20

28 U.S.C. § 1254(1) (Act of June 25, 1948, c. 646, 62 Stat. 928) 2

28 U.S.C. § 1331 (Act of June 25, 1948, c. 646, 62 Stat. 930; July 25, 1958, P.L. 85-554, § 1, 72 Stat. 415) 3

Other Authorities

Allen, State Conservation of Oil and Gas, 5 Rocky Mtn. Min. L. Inst. 59 (1960) 6

18 Attorney General's Opinion 36 (1884) 10

Bureau of Competition, Report to the Federal Trade Commission on Leasing of Indian Lands, (Oct. 1975) 9

66 Cong. Rec. 999, 2234, 2739, 5433-4 19

67 Cong. Rec. 10910, 10912, 10915-19, 10995, 11397 18-19

68 Cong. Rec. 4569 19

Executive Orders Relating to the Jicarilla Apache Reservation 2

Federal Rules of Appellate Procedure, Rule 35 7

Federal and State Reservations and Indian Trust Areas, U.S. Department of Commerce (1974) 27

Final Report of the American Indian Policy Review Commission (1977) 19

Martone, American Indian Tribal Self-Government in the Federal System: Inherent Right or Constitutional License? 51 Notre Dame Lawyer 600 (1976) 15

Oliver, Legal Status of American Indian Tribes, 38 Ore. L.R. 193 (1959) 23

Report of the Federal Trade Commission on Leasing on Indian Lands, 11, 17 (October 1975) 6

Tribal Power to Tax Non-Indian Mineral Lessees, 19 Nat. Res. J. 969 (1979) 19

25 Code of Federal Regulations, Part 171 20

IN THE

Supreme Court of the United States

No. .....

J. GREGORY MERRION AND ROBERT L. BAYLESS, ET AL.,
Petitioners,

v.

JICARILLA APACHE TRIBE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI

Petitioners, J. Gregory Merrion and Robert L. Bayless, d/b/a Merrion and Bayless, Jerome T. McHugh, Chase Oil Company, Dugan Production Corporation, Consolidated Oil and Gas, Inc., Southland Royalty Company, Tesoro Petroleum Corporation, Amerada Hess Corporation, Supron Energy Corporation, Energy Reserves Group, Inc., J. M. Huber Corporation, Continental Oil Company (now Conoco Inc.), Atlantic Richfield Company, Phillips Petroleum Company, Tenneco Oil Company, Getty Oil Company, Gulf Oil Corporation, Mobil Oil Corporation and Oxy Petroleum Inc., respectfully pray that a Writ of Certiorari be issued to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit entered in this proceeding on February 22, 1980, and amended on April 25, 1980.

OPINION BELOW

The opinion of the Court of Appeals, reported at 617 F2d 537 (1980), appears in Appendix A hereto. The amendment to the opinion appears in Appendix B-2. No opinion was

rendered by the District Court for the District of New Mexico but that Court's Findings of Fact and Conclusions of Law appear in Appendix C, and its judgment in Appendix D.

JURISDICTION

The judgment of the Court of Appeals for the Tenth Circuit was entered on February 22, 1980. That decision was modified and rehearing was denied by the Court of Appeals on April 25, 1980. (Appendix B-1). This petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, TREATIES, STATUTES AND EXECUTIVE ORDERS INVOLVED

This case involves the Constitution of the United States, particularly Article I, § 1, § 8, Clause 3, Article II, § 1, Article III, § 1, Article IV, §§ 1, 3, and 4, Article V, Article VI, Article VII, and the Fifth Amendment, Tenth Amendment and Fourteenth Amendment to the Constitution (Appendix E).

The case also involves the Indian Reorganization Act of June 18, 1934, Chapter 576, 48 Stat. 984, *et seq.*, 25 U.S.C. §§ 461, *et seq.*, and Act of March 3, 1971, Chapter 120, § 1, 16 Stat. 566, 25 U.S.C., § 71 (Appendix F); the Treaty of Guadalupe Hidalgo with Mexico, 1848, 9 Stat. 922 Appendix G); Executive Orders Relating to the Jicarilla Apache Reservation (Appendix H); and Act of March 3, 1927, Chapter 299, § 3, 44 Stat. 1347, 25 U.S.C. § 398c (quoted n. 11, p. 17, *infra.*

STATEMENT OF THE CASE

The Jicarilla Apache Tribe of Indians resides on a reservation created by Executive Order, which lies wholly

within the State of New Mexico (Appendix H). The State of New Mexico lies within an area ceded to the United States by the Treaty of Guadalupe Hidalgo which reserved no sovereign powers to any Indian tribe (Appendix G). The tribe is organized under the Indian Reorganization Act of June 18, 1934, 48 Stat. 984, *et seq.*, 25 U.S.C. § 461 *et seq.* (Appendix F).

Petitioners are engaged in the production of oil and gas from tribal lands under valid oil and gas leases issued with the approval of the Tribal Council and the Secretary of the Interior, and pay royalties to the Tribe. It is undisputed that many of these leases were issued prior to the Jicarillas' adoption of their revised constitution in 1968, the first to claim tribal power of taxation. Approximately 80% of the production is shipped interstate for sale outside the State of New Mexico (Appendix C, p. 71).

On July 9, 1976, the Jicarilla Apache Tribal Council adopted an ordinance entitled Oil and Gas Severance Tax (Appendix I). The Jicarilla Severance Tax was levied at the rate of $.05 per million BTU of gas. Oil and other liquid hydrocarbons "sold or transported off the reservation" are taxed at a rate of $.29 per barrel.

Petitioners filed a suit in the United States District Court for the District of New Mexico under 28 U.S.C. § 1331 alleging that the Jicarilla Apache Tribe lacked authority to tax non-Indians. Petitioners further alleged that if the Court should find the Tribe had any governmental authority to tax non-Indians then the Jicarilla Tax violated Article I, § 8, Clause 3 and the Fifth Amendment of the United States Constitution. Finally, Petitioners alleged that if the Tribe had the inherent sovereignty to levy a tax on non-Indians selling hydrocarbons produced on the Jicarilla Reservation then such tribal authority was preempted by 25 U.S.C.

§ 398c. A similar complaint was filed by Amoco Production Co., *et al.*, as Civil No. 77-343. The two cases were consolidated for trial and on appeal.

The District Court entered its Findings of Fact[1] and Conclusions of Law, and Judgment in favor of Plaintiffs/Petitioners on December 29, 1977 (Appendix C, pp. 68 *et seq.*). It held that "Whatever sovereignty the Jicarilla Apache Tribe possesses does not extend to or allow the imposition of a severance tax upon oil and gas produced on the Jicarilla Reservation" (Appendix C, p. 74). After reviewing the legislative history of 25 U.S.C. 398c., the District Court further found that Congress intended therein to allow the states and local authorities the exclusive right to tax oil and gas production from Executive Order Reservations and, therefore, held this Act preempted tribal taxation. In enjoining the defendants from collecting the Jicarilla Tax, the Court declared the tax to be illegal, unconstitutional, invalid and void (id., p. 75).

A divided Court of Appeals for the Tenth Circuit reversed the District Court, holding that the Tribe had the power to tax non-Indians as an attribute of inherent sovereignty, since no treaty or act of Congress specifically authorizes the exercise of such taxing power (Appendix A). In its reversal, the Court directed entry of judgment in favor of the tribe without considering the sources or attributes of the inherent sovereignty originally held or still retained by the Jicarilla Apache Tribe or remanding the case for presentation of evidence on the issue.

---

[1] The Court found, *inter alia*, that if valid, the Jicarilla Tax combined with the State severance taxes would create a tax burden of more than 29% of the price of old gas, and over 12.5% of the price of old oil (Appendix C, p. 73), and that it would discriminate against and constitute a multiple burden upon interstate commerce.

The Court found that while the Commerce Clause limits the power of Indian tribes the Jicarilla oil and gas severance tax is not in violation thereof (Appendix A, p. 15). The Tenth Circuit did not otherwise address the protection afforded by the Constitution of the United States to non-Indians operating on Indian lands and dealing with tribes.

Finally the majority of the Court of Appeals held that 25 U.S.C. 398c. was not preemptive of the Jicarilla severance tax even though it granted the states the express authority to tax oil and gas produced on Executive Order Reservations.

REASONS FOR GRANTING THE WRIT

THIS CASE PRESENTS IMPORTANT QUESTIONS OF FEDERAL LAW WHICH HAVE NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

This case presents legal issues of first impression, having far ranging social, political, and economic consequences for both Indians and non-Indians. The question of whether an Indian tribe can tax non-Indians producing oil and gas under leases approved by the Secretary of the Interior has not been decided by this Court. That this is an issue of first impression was expressly recognized by the Court of Appeals for the Tenth Circuit (Appendix A, p. 9).

The decision of the Court of Appeals in this case can have far-reaching consequences. It is especially important that the issues in this case be considered since this Court's decisions in *Washington* v. *Confederated Tribes of the Colville Reservation* — U.S. —, 48 U.S.L.W. 4688 (June 10, 1980), *White Mountain Apache Tribe* v. *Bracker*, — U.S. —, No. 78-1177 (June 27, 1980), and *Central Machinery Co.* v. *Arizona State Tax Commission*, — U.S. —, No. 78-1604 (June 27, 1980), have laid down new guidelines since the

Court of Appeals decision herein. In *Colville* this Court held that Indian tribes have the power to levy and collect tribal taxes on cigarettes. Since Indian reservations contain a very significant portion of this country's future energy reserves,[2] it is important for this Court to determine whether the development of this energy "significantly involves the tribes" or is a problem national in scope. If Indian tribes have the power to tax this energy production without coordination with, or limitation by, the state or federal governments, they clearly have control over an area "significantly involving" the nation as a whole.[3] More importantly, *Colville* did not squarely present the fundamental question raised here as to the far-reaching constitutional implications of tribal sovereignty.

If, as Petitioners contend, Indian "sovereignty" can exist only under the mantle of federal sovereignty, it is important for this Court to determine whether Indian tribes can tax lessees operating under valid oil and gas leases approved by the Secretary of the Interior. While Indian tribes have been held to have the "inherrent tribal power to exclude non-Indians or impose conditions on those permitted to enter (*Colville, supra* at 48 L.W. 4674) once the tribe has agreed to the consideration specified.

---

[2] As long ago as 1974, Indian oil and gas leases covered a collective acreage of 4,187,644 and produced 30,685,000 barrels of oil and 125,080,000 mcf of gas. It is estimated that coal under Indian reservations could provide more than 50 billion tons, or 10% of the nation's future needs, and that uranium reserves located on Indian Reservations constitute about two-thirds of all uranium reserves on federal land. Bureau of Competition, *Report to the Federal Trade Commission on Leasing on Indian Lands*, 11, 17 (October 1975).

[3] That tribal economies have not traditionally been based on oil and gas production and that regulation of the country's energy supply is a national problem, was recognized by state officials long ago. *See, e.g.* Allen, *State Conservation of Oil and Gas*, 5 Rocky Mtn. Min. L. Inst. 59, 70 (1960).

in a federal lease, additional tribal taxation raises significant legal issues.

The Court of Appeals below recognized that the questions involved in this case were indeed "important" questions. The matter was first heard by three members of the Court of Appeals. Prior to a decision being rendered, however, the Court of Appeals, *sua sponte*, set the issue of whether Indian sovereignty included the power to tax non-Indians, for rehearing *en banc* (Appendix J). Since the court found this a case of first impression, it may be fairly assumed that the rehearing *en banc* was ordered because of the issues involved, as provided by Rule 35, Federal Rules of Appellate Procedure.

The importance of the present case is indicated by the fact that amici briefs were filed before the Court of Appeals on behalf of the States of New Mexico, Utah, Montana, North Dakota, and Wyoming in opposition to the tribal tax. Amici briefs were filed on behalf of the Navajo Tribe, the National Congress of American Indians, the Arapahoe Tribe of the Wind River Reservation, Wyoming, and the Three Affiliated Tribes of the Fort Berthold Reservation, North Dakota, and the Shoshone Indian Tribe and the Assiniboine and Sioux Tribes, in support of Respondents.

While this Court has dealt with the concept of Indian sovereignty many times, it is clear from the continuing flood of cases that there still exists a fundamental unresolved question of constitutional law as to the limits which must be placed on the previously enunciated doctrine of tribal sovereignty. The applicability of restrictions imposed by the Constitution as well as those flowing from tribal dependent status are significant issues herein as criminal and quasi-criminal sanctions enforcing tribal taxes against non-Indians are involved. While the extent of tribal sov-

ereignty was considered in specific limited factual situations in each of the cases recently decided by this Court, the limits of tribal power over non-Indians and the rights of non-Indians when confronting tribal authority were not decided.

The limits on tribal authority over the property and lives of non-members doing business with Indians tribes is, therefore, an issue which demands this Court's immediate attention.

The decision of the Court of Appeals in this case can have far-reaching consequences.[4] Based, as it was, solely on a finding of "inherent sovereignty" it will open a new flood of litigation concerning the right of Indians to control the property and lives of non-Indians. If the opinion is allowed to stand, other tribes will take it as a signal that they, too, are free to impose energy taxes on non-Indians.[5] The validity of one such tax is already before the Court of Appeals for the Ninth Circuit[6] and other challenges to various forms of Indian taxation of nonmembers are being litigated in numerous District Court actions.[7] According

---

[4] Again, recognizing the reference in *Colville* to "Indian sovereignty," Petitioners respectfully submit that the Court there was not faced with, and did not address, the questions raised here or the full constitutional consequences of tribal sovereignty.

[5] In reliance on the Tenth Circuit Court's opinion in this case, the Shoshone and Arapahoe tribes in Wyoming have reasserted their severance tax ordinance on oil and gas production, challenged in *Conoco Inc., et al.* v. Shoshone and Arapahoe Tribes, *et al.*, No. C-80-0181 (D. Wyo.).

[6] *Salt River Project Agricultural Improvement and Power District* v. *Navajo Tribe of Indians*, 9th Cir. No. CA78-3492.

[7] *Arizona Public Service Company, et al.*, v. *Cecil Andrus, et al.*, No. CV 78-238-C (D.N.M.); *Southland Royalty Company*, v. *Navajo Tribe of Indians*, C-79-0140 (D.Utah); *Amoco Production Company* v. *Peter MacDonald, et al.*, CV-79-155-B (D.N.M.); *Kerr-McGee Corp.* v. *Navajo Tribe of Indians*,

to the amicus brief filed below by the National Congress of Indians, in 1978 at least 55 tribes were imposing various forms of tribal taxes on non-Indians.

1. Do Indian Tribes Have the Power to Tax Non-Members as a Condition For Remaining on the Reservation Under Pre-Existing Contracts?

The majority opinion of the Court of Appeals framed the question of tribal jurisdiction over the non-Indian Petitioners as "the bald issue of an Indian tribe's taxing power without benefit of reservations of authority in a treaty." (Appendix, p. 13). The Court of Appeals held that "the tribe has the inherent power to levy a privilege tax on the occupation of severing oil and gas from reservation land even though the tax falls on nonmembers." (Appendix, p. 15).

Petitioners submit the Court of Appeals below confused the sovereignty of the United States government with the proprietary rights of Indian tribes by referring to the power to exclude or condition entry retained by any property owner as a "sovereign power." In attempting to excavate the legal foundation for the tribal power to tax non-Indians, the Court of Appeals majority said:

> "But *two different sovereign powers* have been relied upon — the power to tax, *e.g.*, Cherokee Indians — Export Tax on Hay, 23 Op. Att'y Gen. 528 (1901), or the power to exclude non-members from the reservation and set the terms upon which such persons could

---

et al., CV-79-383-M (D.N.M.); *Blackfeet Tribe of Indians* v. *State of Montana, et al.*, CV-78-61 GF (D. Mont.); *Conoco Inc. et al.* v. *Shoshone and Arapahoe Tribes, et al., supra; Kerr-McGee Corp.* v. *Navajo Tribe of Indians, et al.* CIV 80-247-PHX-wpc (D. Ariz.); *Union Oil Co. of Calif.* v. *Peter MacDonald, et al., CIV* 79-738 (D.N.M.).

> enter and do business therein. *E.g., Buster* v. *Wright*, 135 F. at 950." (emphasis supplied) (Appendix A, p. 13).

In discussing the origins of tribal sovereignty the Court of Appeals purported to find a "commonly shared presumption of Congress, the Executive Branch, and the lower federal courts . . . that the tribes retain the power to levy a tax that falls upon non-members doing business on the reservation." (Appendix A, p. 12). As the earliest pronouncement of the Executive Branch cited by the Court of Appeals indicates, such tribal power was generally traced to proprietary rights. In 18 Op. Att'y Gen. 36 (1884), Attorney General Phillips compared the tribes to proprietary innkeepers and made it clear their taxation powers did not apply to persons rightfully on the reservation:

> "In the absence of treaty or statutory provision to the contrary, the Choctaw and Chickasaw nations have power to regulate their own rights of occupancy, and to say who shall participate, and upon what conditions, and hence may require permits to reside in the nations from citizens of the United States, and levy a pecuniary exaction therefor . . . I submit that, whatever this may mean, it does not limit the right of these tribes to pass upon the question, who . . . shall share their occupancy, and upon what terms. . . . The serious words 'jurisdiction' and 'self-government' are scarcely appropriate to the right of a hotel keeper to prescribe rules and charges for persons who became his fellow occupants." 18 Op. Att'y Gen. at 36-7 (1884).

The proprietary foundation of tribal authority to tax is important in the instant case because the Jicarilla Tribe clearly did not have the right to impose a license fee as a condition on Petitioners' right to enter tribal lands or engage in business thereon. Petitioners had executed leases with the Jicarillas long before any Jicarilla tribal taxes

were conceived or imposed. These leases set specific bonus, rental and royalty payments to be made by the Petitioners to the Tribe and such provisions were expressly approved by the United States Secretary of the Interior.

Tracing the source of tribal authority to tax to the power to exclude is particularly appropriate in the case of a tribe such as the Jicarilla Apaches. Unlike many Indian tribes, the Jicarillas were not an organized and existing sovereign government at the time the Constitution was signed. As Chief Judge Seth pointed out in his dissent below, the Jicarillas totally lacked any central authority and merely banded together for purposes of military defense or aggression. (Appendix A p. 32). When the United States acquired the New Mexico territory from Mexico in the 1848 Treaty of Guadalupe Hidalgo, there was no existing Jicarilla governmental authority. (Appendix A p. 30-33). Any governmental sovereignty possessed by Jicarillas must, therefore, have been expressly granted by the United States subsequent to acquisition of this territory.

These historical limitations on Jicarilla sovereignty, articulated so cogently in Judge Seth's dissent, are completely consistent with the construction by this Court in *Late Corporation of the Church of Jesus Christ of Latter-Day Saints* v. *United States,* 136 U.S. 1 (1890) of the effect of the Treaty of Guadalupe Hidalgo upon the territory annexed. In *Latter-Day Saints,* this Court found that from the moment the United States acquired lands from Mexico by virtue of the Treaty of Guadalupe Hidalgo, the United States was the only sovereign in the territory and all governmental power derived from that source:

> "Having rightfully acquired said territories, the United States Government was the only one which could impose laws upon them, and its sovereignty over them was complete. No state of the Union had any

> such right of sovereignty over them; no other country *or government* had any such right. These propositions are so elementary, and so necessarily follow from the conditions of things arising upon the acquisition of new territory, that they need no argument to support them. They are self-evident." 136 U.S. at 42-3. (emphasis supplied).

It is clear that this Court intended the same rule to apply to tribal governments since only four years prior to the rule as enuciated in *Latter-Day Saints,* this Court had decided *United States* v. *Kagama,* 118 U.S. 375 (1886). Indeed, this Court recognized the difficulties of integrating tribal sovereignty into the dual Federal-State system created by the Constitution in *White Mountain Apache Tribe* v. *Bracton,* — U.S. —, (No. 78-1177, June 27, 1980). In recognizing the continuing validity of *Kagama,* Justice Marshall, speaking for the Court opined:

> "The status of the tribes has been described as 'an anomalous one and of complex character,' for despite their partial assimilation into American culture, the tribes have retained 'a semi-independent position . . . not as States, not as nations, not as possessed of the full attributes of sovereignty, but as a separate people, with the power of regulating their internal and social relations, and thus far not brought under the laws of the Union or of the State within whose limits they resided.' *McClanahan* v. *Arizona State Tax Comm'n,* 411 U.S. 164, 173, (1973), quoting *United States* v. *Kagama,* 118 U.S. 375, 381-382 (1886)."

Petitioners respectfully submit that this Court discussed Indian taxation authority in *State of Washington* v. *Confederated Tribes of the Colville Indian Reservation,* — U.S. —, 48 U.S.L.W. 4668 (1980) fairly raised only the question of the applicability of state cigarette and motor vehicle taxes on Indian reservations. *Colville* involved state sales taxes by the State of Washington against nonmembers making purchases of cigarettes and tobacco on

the reservation, and motor vehicle taxes on tribal members residing on the reservation. In *Colville,* the lower court ruled against the applicability of the state taxes to non-members on the reservation. This Court reversed in this respect, upholding the authority of the state not only to impose the taxes on non-members on the reservation but also to require the tribes to keep records for and collect the state taxes and to assert state civil and criminal jurisdiction over the Indian tribes to enforce the state taxes. This Court affirmed the lower court in *Colville* only with respect to denying applicability of the state motor vehicle tax on tribal members, quite a different question than those presented here with regard to Indian taxation of non-members.

Mr. Justice Rehnquist in *Colville, supra,* recognized the lack of a coherent doctrine on the question of Indian taxation and turned again to the principle of federal preemption as the basis for analysis of the issue. He pointed out that *McClanahan* v. *Arizona State Tax Commission,* 411 U.S. 164 (1973), did not resolve to what extent residual Indian sovereignty in the total absence of federal treaty obligation or legislation would still be recognized. 48 U.S.L.W. 4680, and note 2.

In *United States* v. *Wheeler,* 435 U.S. 313 (1978), this Court found that Indian tribes do not possess sovereignty to the same extent or from the same source as that of the United States Government. The Court pointed out that "the sovereignty that the Indian tribes retain is of a unique and limited character." 435 U.S. 323. Justice Stewart, in the Court's unanimous opinion, described the area of sovereignty necessarily withdrawn as a result of dependent tribal status:

> "The areas in which such implicit divestiture of sovereignty has been held to have occurred are those

> involving the relations between an Indian tribe and nonmembers of the tribe . . . . These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently to determine their external relations." 435 U.S. at 326.

While this Court stated there was no implicit divestiture of the tribe's inherent powers in *Colville*,[8] that statement was grounded on the lack of an overriding federal interest that would be frustrated by tribal taxation in that case. 48 U.S.L.W. at 4673. To the contrary, in the present case there is such an overriding interest. It is an issue of vital significance to the Western states whether Indian tribes will be allowed to tax the same mineral production already taxed by the States under congressional authority, since multiple taxation here could well overburden mineral production to the point of abandonment or confiscation by the tribes, *sans tax*. This presents an issue of considerable federal significance.

The Court of Appeals below, erroneously attempted to predicate Indian sovereignty on the Commerce Clause of the United States Constitution. The majority of the Court of Appeals implicitly, and Judge McKay's concurrence explicitly, assume that by mentioning "Indian tribes" in the Commerce Clause of the Constitution, the founding fathers intended such tribes to assume general governmental authority within the territorial boundaries of their reservation. (Appendix, p. 10, 15, 25). This Court rejected any such

---

[8] *Colville*, relying on *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979) expressly upheld the state's assumption of both civil and criminal jurisdiction over the tribes — a result incongruous with the notion of tribal sovereignty urged by the Apaches and supported by the Court of Appeals here.

interpretation of the Commerce Clause in *United States* v. *Kagama,* 118 U.S. 375 (1886), where it concluded that there is no legitimate sovereignty contemplated for Indian tribes within the Constitutional framework. In a passage quoted with approval in *Oliphant* v. *Suquamish Tribe,* 435 U.S. 191 (1978), the Court said:

> "Indians are within the geographical limits of the United States. The soil and the people within these limits are under the political control of the government of the United States or of the States of the Union. There exists within the broad domain of sovereignty but these two." 118 U.S. at 379.

The Supreme Court's recognition of the fact the Constitution fails to reflect any general governmental power for Indian tribes is also supported by historical documents indicating its draftsmen did not contemplate a general governmental role for Indian tribes. For discussion, see Martone, *American Indian Tribal Self-Government in the Federal System: Inherent Right or Constitutional License?* 51 Notre Dame Lawyer, 600 (1976).

To grant Indian tribes the general governmental authority bestowed by the Court of Appeals would directly contravene the entire dual system of federal-state government established by the Constitution[9]. Dissenting from the majority below, Chief Judge Seth noted that the United States and the states are the only two governmental entities contemplated by the Constitution. To allow Indian tribes sovereignty within the territorial boundaries of a state, but not subject to state control, is inconsistent with the federal concept of our Constitutional system:

---

[9] Article I; Section 1; Article II, Section 1; Article III, Section 1; Article IV; Article V; Article VI; Article VII; and the Tenth Amendment (Appendix E).

> "The Constitution contemplates that the states are to create within their boundaries the counties, parishes, cities, and villages. The states thus establish *all* the local bodies and *all* entities having governmental powers within their boundaries. The federal government, under its residual powers, retained no authority to create governmental bodies within the states." (Appendix A, pp. 33-34).

To grant Indian tribes the sovereignty over non-Indians urged by the majority of the Court of Appeals would be to elevate such tribes to a level equal to or greater than that of States of the Union. In his concurring opinion, Judge McKay, equating tribes with federal municipalities, expressly recognized the implications of the majority position in attributing "police powers, regulatory power, or fiscal powers" to Indian tribes. (Appendix, p. 28). This approach would require that reservation enclaves be carved out of the existing states to accommodate 287 tribal governments[10]. The states would have absolutely no control over the exercise of governmental authority within those Indian enclaves existing within their borders. As this Court has expressly recognized in *United States* v. *Kagama*, 118 U.S. 375, 381 (1886), the semi-independent position of Indian tribes to regulate their internal and social relations does not give tribes governmental power to the same extent as that granted the states. Cf. *White Mountain, Supra,* Slip. Op. pp. 5, 6 The policy purposes underlying the doctrine of "tribal sovereignty," including *inter alia* the preservation and development of tribal customs and religion, may be fully achieved without subjecting other Americans to tribal jurisdiction. Petitioners respectfully submit our federal system was not

---

[10] *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, at 65, n. 21 (1978).

designed to, and cannot, accommodate such broad governmental authority by an entity not recognized by the Constitution.

2. If Indian Tribes Have Taxation Authority Over Non-Indians, Has Such Authority Been Preempted on Executive Order Reservations by 25 U.S.C. § 398c?

The right of tribal self-government is ultimately dependent on and subject to the broad power of Congress. *White Mountain Apache Tribe* v. *Bracker*, — U.S.—, (No. 78-1177, 1980). Unquestionably one of the critical bellwethers in determining the interests of the states and Indian tribes in regulating the activities of non-Indians on a reservation is the intent of Congress. *Colville*, 48 U.S.L.W. 4674, 4676, 4679. Petitioners submit such Congressional intent to preempt any tribal taxation power possessed by the Jicarillas is expressed in 25 U.S.C. 398c.[11]

Although treaties were signed by representatives of the United States Army and Jicarilla Apache leaders, none were ever ratified by Congress. In 1871, by the provisions of 25 U.S.C. § 71, Congress recognized the tribes were no longer regarded as sovereign nations but were regulated by Congressional statute. *De Coteau* v. *District County*

---

[11] 25 U.S.C. § 398c. reads in full:

> Taxes may be levied and collected by the State or local authority upon improvements, output of mines or oil and gas wells, or other rights, property, or assets of any lessee upon lands within Executive order Indian reservations in the same manner as such taxes are otherwise levied and collected, and such taxes may be levied against the share obtained for the Indians as bonuses, rentals, and royalties, and the Secretary of the Interior is hereby authorized and directed to cause such taxes to be paid out of the tribal funds in the Treasury; *Provided*, that such taxes shall not become a lien or charge of any kind against the land or other property of such Indians. Mar. 3, 1927, c. 299, § 3, 44 Stat. 1347.

Court, 420 U.S. 425, 432 (1975) Cf. *Organized Village of Kake* v. *Egan,* 369 U.S. .60, 72 (1962). Since no Jicarilla treaty was ratified by Congress prior to 1871, when it terminated recognition of the remaining recalcitrant Indian bands, a series of Executive Orders relating to the Jicarillas was promulgated and revoked. (*See,* Seth Dissent, Appendix A, pp. 34-35 and Appendix H). Finally, a location was chosen and a reservation created for the Jicarillas by Executive Order.

In light of the purposes of 25 U.S.C. § 71 and the marked change in attitude it represented, Congress adopted a somewhat hostile attitude toward reservations created exclusively by the President after 1871. It is from this historical perspective that "the broad policies that underlie" 25 U.S.C. § 398c. must be judged. *White Mountain Apache Tribe* v. *Bracker, supra,* slip opinion at 8. *Cf. United States* v. *Sioux Nation* — U.S. —, slip op. at 431 June 30, 1980). During the long debate on this Act, Senator Bratton, who subsequently became a judge on the Tenth Circuit Court of Appeals, explained the legal infirmities of this Executive Order process:

> "Upon the question of this title, the Executive has set apart these reservations by proclamation from time to time since 1871 without any express authority from Congress. It is a practice that has been followed, and it has been recognized inferentially or indirectly from time to time by Congress. However, when we deal with the question of title to these lands, we are confronted with this situation: We have about 22,000,000 acres of land that at one time belonged to the United States. If the government does not own the title now, it is by virtue of presidential proclamations divesting the government of that title and vesting it in the Indians.
>
> "The Constitution provides that — 'The Congress shall have power to dispose of and make all needful

> rules and regulations respecting the territory or other property belonging to the United States.' If the Indians own the title to these lands so that they own the minerals under them, the President has vested that title in them by presidential proclamation in the face of a Constitutional provision vesting that authority in the Congress." 67 Cong. Rec., 10995 (1926). (*See, also* 67 Cong. Rec. 10915; 10910 (1926)).

That Congress would not have condoned tribal taxation of non-Indians is clear from the history and debate surrounding the passage of 25 U.S.C. § 398c. This statute was adopted as a compromise between those who felt the states were clearly entitled to all the royalties on oil and gas severed from Executive Order Indian reservations and those who felt the tribes should get a portion of such royalties[12]. Indeed a recent Congressional study recognized that Indians have traditionally received royalties rather than taxes as revenue from mineral production on their land and implicitly acknowledged that 25 U.S.C. 398c. should be repealed in order to allow tribal taxation[13].

Petitioners submit, therefore, that if Indian tribes have the inherent power to tax non-Indians generally such power has been preempted by Congress as to oil and gas taxation on Executive Order Indian Reservations[14].

Even if Congress did not intend 25 U.S.C. 398(c) to grant the states exclusive taxation authority over oil and gas produced from Executive Order Reservations, the overall Congressional attention to Indian leasing indicates a pre-

---

[12] 66 Cong. Rec. 999, 2234, 2739, 5433-4, 67 Cong. Rec. 10912, 10915-19, 10995, 11397, 68 Cong. Rec. 4569.

[13] Final Report of the American Indian Policy Review Commission at 81 344-45.

[14] See Barrett, J., dissent, Appendix, p. 52, tax non-Indians Mineral Lessees, 19 Nat. Res. J. 969 at 991 (1979).

emptive intent. Federal Regulations govern every minute detail of Indian leasing. This federal regulatory scheme, therefore, totally preempts any tribal tax not recognized therein. The Secretary of the Interior is given broad supervisory authority over tribal lands and assets under 25 U.S.C. § 464. Under the terms of 25 U.S.C §§ 81 and 415, the Secretary is charged with the duty to approve or disapprove contracts and leases with the Indian tribes. Under 25 U.S.C. § 396d, "all operations under any oil, gas or mineral lease issued pursuant to the terms of any act affecting restricted Indian lands shall be subject to the rules and regulations promulgated by the Secretary of the Interior." The Secretary has exercised these statutory mandates in Part 171 of Title 25 of the Code of Federal Regulations. These regulations govern, among other matters, the method of acquiring leases from the tribes (§§ 171.1a to 171.9), the term of such leases (§ 171.10), manner of payments (§ 171.12), rates of rentals and royalties under oil and gas leases (§ 171.13), the time for making royalty payments (§ 171.16), waste prevention (§ 171.19), restrictions on and approval of oil and gas operating plans (§§ 171.20 and 171.21), assignment of lease interests (§ 171.26) and cancellation of leases (§ 171.27). Most specifically the Code of Federal Regulations prohibits any unilateral increase in the remuneration required under the leases. 25 C.F.R. 171.28.

The comprehensive character of federal reguulation over oil and gas operations on tribal lands leaves little, if any, room for regulation by Indian governmental entities. When the laws of an inferior sovereign "touch upon" the area of a comprehensive federal policy, the latter "may not be set at naught or its benefits denied" by the laws of the lesser or dependent sovereign. *Sears, Roebuck & Co.*, v. *Stiffel Co.*, 376 U.S. 225, 229 (1964). In *Warren Trading Post Co.* v. *Arizona Tax Commission*, 380 U.S. 685 (1965), this

Court addressed the question of whether Congress's delegation of authority to the Commissioner of Indian Affairs over trading on the reservations preempted state taxation of reservation traders. The Court reviewed the Commissioner's "detailed regulations" concerning traders and concluded:

> "These apparently all-inclusive regulations and the statutes authorizing them would seem in themselves sufficient to show that Congress has taken the business of Indian trading on reservations so fully in hand that no room remains for state laws imposing additional burdens upon traders." 380 U.S. at 690.

The Court held:

> "Indian traders trading on a reservation with reservation Indians are immune from a state tax like Arizona's . . . because Congress in the exercise of its power granted in Article 1, § 8, has undertaken to regulate reservation trading in such a comprehensive way that there is no room for the States to legislate on the subject." Id. at 691 n.18.

As in *Warren Trading Post*, the Secretary's "apparently all-inclusive regulations" over reservation oil and gas operations, together with the statutes that authorize them, would seem in themselves sufficient to show that Congress has taken the matter so fully in hand that no room remains for additional tribal taxes "imposing additional burdens" on oil and gas lessees. "There is no room for these taxes in the comprehensive federal regulatory scheme." *White Mountain*, — U.S. — (No. 78-1177, 1980), slip opinion pp. 11-12. "The imposition of the taxes at issue would undermine that policy in a context in which the Federal Government has undertaken to regulate the most minute details of [oil and gas] production". *Ibid.*

3. If Indian Tribes Have Governmental Authority Over Non-Indians, Must Non-Indians Be Accorded the Full

Range of Constitutional Protections Against Abuses of Tribal Authority?

A further important question of federal law which has not been, but should be, settled by this Court is the nature and extent of Constitutional guarantees which must be extended non-Indians as a protection against the excesses of any sovereignty found to exist in Indian tribes. Petitioners submit that this Court's decisions holding that Indian tribes need not extend constitutional rights to their own members support the proposition that Indian tribes were not intended to have coercive governmental authority over non-Indians. In *Santa Clara Pueblo* v. *Martinez,* 436 U.S. 49 (1978); for example, this Court recognized:

> "As separate sovereigns pre-existing the Constitution, tribes have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority." 436 U.S. at 56.

The facts involved and language employed in *Santa Clara* emphasize the lack of Constitutional inhibitions on tribal government apply only when the tribe is dealing with its own members in areas traditionally regulated by Indian custom. A careful review of the opinion in *Santa Clara* leads to the conclusion that this Court recognized that Constitutional restraints upon tribal government were not necessary because tribal government has authority only on internal matters traditionally governed by Indian practices and customs. Justice Marshall, speaking for the Court, clearly articulated the parameters of tribal authority as involving strictly internal tribal matters.

> "Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government. Although no longer 'possessed of the full attributes of sovereignty,' they

> remain a 'separate people, with the power of regulating their internal and social relations." 436 U.S. at 55.

Given this Court's holdings that Indian tribes are not constrained by the Constitution, two alternatives exist: (1) either such tribes cannot have authority over non-Indians; or (2) non-Indian citizens can be totally deprived of their Constitutional rights by Indian tribes. Petitioners submit that this Court's decision in *Santa Clara* supports the first alternative.

Logic dictates that since tribal customs and traditions differ from the Anglo-American concept of jurisprudence, the United States Constitution need not be injected into the relationship between tribal members and their government. *Groundhog* v. *Keeler,* 442 F.2d 674 (10th Cir. 1971). To hold, however, that non-Indians lose their Constitutional rights merely by entering an Indian reservation would create 287 enclaves within the territorial boundaries of the United States, on which non-Indian citizens can be totally deprived of their Constitutional rights. This contravenes the long established principle that the Constitution is binding on all within the territory of the United States and does not contemplate such exempt enclaves. *Southern R. Co.* v. *Greene,* 216 U.S. 400, 412 (1910); *cf. Healy* v *James,* 408 U.S. 169, 180 (1972).

If Indian tribes are to be given general governmental authority over non-Indians, such tribes must be subject to all the limits on governmental authority provided in the Constitution[15]. Without such Constitutional restraint, tribal

---

[15] Officials of the Executive Branch charged with supervision of Indian tribal government have long recognized Indian self-government must operate within the limitations of the Constitution. *See, e.g.* Letter from Under Secretary Hatfield Chilson quoted in *Oliver, Legal Status of American Indian Tribes,* 38 Ore. L.R. 193 at 243 (1959).

action could expropriate property worth hundreds of millions of dollars and banish non-Indian citizens rightfully on reservations[16]. As this Court recognized in *Oliphant*, tribal jurisdiction over non-Indians raises enormous Constitutional problems. 435 U.S. at 211-12. In *Oliphant*, this Court rejected the argument that tribal regulations could be applied to non-Indians without any regard for their Constitutional rights:

> "Since the formation of the Union and the adoption of the Bill of Rights, the United States has manifested an equally great solicitude that its citizens be protected by the United States from unwarranted intrusions on their personal liberty . . ." *Oliphant* v. *Suquamish Indian Tribe, supra.* 435 U.S. at 210.

In *Colville, supra,* this Court again recognized that any "exercise of tribal sovereignty would be inconsistent with the overriding interests of the National Government," when the tribes do not accord the full protections of the Bill of Rights to non-Indians. 48 U.S.L.W. at 4673.

There is no Constitutional value more central to our notion of political justice than that subjection to governmental power presupposes the right to petition and participate in that government on an equal basis. Indeed this Court has very recently reiterated that, "In

---

[16] When the enforcement of such tribal taxation involves the banishment of non-Indians from the reservation, cancellation of their leases and seizure of their property they require the criminal jurisdiction prohibited to the tribes. *Quechan Tribe* v. *Rowe*, 531 F.2d 408 (9th Cir. 1976); cf. *Pennsylvania Coal Co.* v. *Mahon*, 260 U.S. 393, 1922). The Navajo Tribal Counsel recently recognized this fact in arguing in favor of the tribes power of banishment and expropriation of property, "The power to tax must, by necessity, include the power to enforce the tax or it is meaningless: a 'voluntary' tax is no tax at all." *Kerr McGee Corp.* v. *Navajo Tribe of Indians*, Civ 80-247-PHX-WPC Memorandum In Support of Motion for Summary Judgment p. 17.

this nation each sovereign governs only with the consent of the governed." *Nevada* v. *Hall,* 440 U.S. 410, 426 (1979). Participation in the deliberations and proceedings of an Indian tribal council is, however, unquestionably a right denied non-Indians. This principle can also be seen in this Court's recent decisions which guarantee equal franchise to those substantially affected by governmental action *See, e.g., Cipriano* v. *City of Houma,* 395 U.S. 701 (1969). To make a non-Indian subject to tribal government, when he is completely disinfranchised by the tribe would violate the Constitutional concept of equal protection. *City of Phoenix* v. *Kolodziejski,* 399 U.S. 204 (1970); *Evans* v. *Cornman,* 398 U.S. 419 (1970); *Terry* v. *Adams,* 345 U.S. 461 (1953).

The Court of Appeals would subject non-Indians to tribal governmental power without allowing them any right to petition or participate in tribal government. Chief Judge Seth, in dissent, clearly recognized this flaw in the majority reasoning, saying:

> "The state-created entities are the ones in which the opportunity for participation extended to all persons within the boundaries. These are the foundations of governmental authority as it exists in the United States." (Appendix A, p. 34).

Judge Seth also observed governmental "sovereign power" should not be attributed to Indian tribes precisely because of their failure to allow non-members to participate:

> "The sovereignty argument advanced by the Secretary must lose significance for purposes under consideration because non-members of the Tribe (including Indian non-members) are excluded from participation. This is an express exclusion based solely on Tribal membership. Perhaps this is how it should be for self-determination; however, such a group of Tribal mem-

bers excluding all others cannot exert governmental authority over those excluded. It is obvious that our whole governmental structure is based on representation with an opportunity to participate. When this is provided, authority exists to govern." (Appendix A, p. 35).

4. Does the Tribal Tax Unduly Burden Interstate Commerce?

The Jicarilla tax would also place a multiple burden on interstate commerce in violation of Article I, Section 8, Clause 3 of the Constitution of the United States. The Court of Appeals majority opinion recognizes that New Mexico imposes four separate severance taxes upon the same oil and gas to which the Jicarilla Severance Tax would apply. (Appendix, p. 19). The majority, however, dismissed the multiple burden argument by stating:

> "It is beyond question that no state, *with the exception of New Mexico,* has a sufficient connection with the occupation of severing oil and natural gas within the reservation to support a levy of a severance tax on lessee's occupation. There is thus no threat of a multiple burden emanating from this tax *unless the possibility, which we assume is fact, of New Mexico levying an identical tax constitutes a multiple burden within the meaning of the Commerce Clause.* That New Mexico may be able to impose an identical tax on leases does not implicate federal interest in maintaining the flow of interstate commerce at all, we believe." (emphasis added) (Appendix A, pp. 19-20).

Petitioners respectfully submit that the Court of Appeals ignores the Constitutional proscription against multiple burdens upon interstate commerce. The majority and concurring opinions give Indian tribes the powers of a local government. If an Indian tribe is indeed analogous in governmental power even to a local government, then it is

clear that such tribal taxation must be subject to dual Commerce Clause scrutiny. *Dean Milk Co.* v. *Madison,* 340 U.S. 349 (1951). Taxation of a single event by more than one government works to the advantage of local commerce because such local commerce cannot be so frequently taxed. *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250 (1938).

If, as the Court of Appeals held, the Jicarilla tax is levied on the incident of severance of the oil and gas from the Jicarilla Reservation, then the Jicarilla tax constitutes an impermissible burden upon interstate commerce because New Mexico taxes the same "local" event. The Court of Appeals dismissed this burden since only two entities imposed such taxes on a single event. This highlights the pernicious effect of the majority's holding, which creates impermissible governmental enclaves within the territorial boundaries of the existing states. The creation of these "local" governments within the existing states, but not subject to the jurisdiction thereof, will allow "local taxes" by both tribal and state governments. The problem may be illustrated by the fact that California alone has 66 Indian reservations within its borders. Arizona's mere 17 reservations occupy territory larger than 13 of the States, and cover one-third of Arizona's 114,000 square miles[17]. Such widespread establishment of Indian taxation would effectively destroy existing State taxation. The majority opinion below creates a unique legal situation where several totally autonomous sovereign governments exist within the borders of a State of the Union and all can tax without coordination or restriction, at least until the combined level reaches confiscation.

---

[17] Federal and State Indian Reservation and Indian Trust areas, U.S. Department of Commerce (1974).

CONCLUSION

Petitioners respectfully submit certiorari should be granted to settle the important questions of federal law raised herein and to bring the judgment and opinion of the Court of Appeals below into conformity with the applicable decisions of this Court governing Indian tribal sovereignty over non-Indians.

Dated: 1 July 1980.

Respectfully submitted,

JASON W. KELLAHIN
KELLAHIN & KELLAHIN
P. O. Box 1769
Santa Fe, New Mexico 87501
(505) 982-4285

BRUCE DOUGLAS BLACK
CAMPBELL & BLACK
P. O. Box 2208
Santa Fe, New Mexico 87501
(505) 988-4421

THOMAS H. BURTON
JOHN M. WIMBISH
P. O. Box 2197
Houston, Texas 77001
(713) 965-1030

Counsel for Petitioners